UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MAGNUM TRANSPORTATION, INC.,	)	
	)	
Employer,	)	
and	)	
	)	**Case No. 13-RC-113924**
EXCAVATING, GRADING, ASPHALT, PRIVATE SCAVENGERS and RECYCLERS, AUTOMOBILE SALESROOM GARAGE ATTENDANTS, LINEN and LAUNDRY and MACHINERY, SCRAP IRON, STEEL, and METAL TRADE CHAUFFEURS, HANDLERS, HELPERS, and ALLOY FABRICATORS, TEAMSTERS LOCAL UNION NO. 731,	)	
	)	
Petitioner.	)	

PETITIONER'S ANSWERING BRIEF

Petitioner Excavating, Grading, Asphalt, Private Scavengers and Recyclers, Automobile Salesroom Garage Attendants, Linen and Laundry and Machinery, Scrap Iron, Steel, and Metal Trade Chauffeurs, Handlers, Helpers, and Alloy Fabricators, Teamsters Local Union No. 731 ("Local 731") files its Answering Brief concerning the determinative challenged ballot and Employer Objection no. 1.

For the reasons explained below, the Board should adopt the Hearing Officer's Recommendation that the determinative challenged ballot of Anthony Indendino be sustained, that the Employer's Objection no. 1 [1] be overruled, and that a Certification of Representative issue.

[1] The Employer has abandoned its Objections nos. 2 - 5.

Factual background

The election was conducted on November 8, 2013 (Tr. 96; Board Exh. 1(b)). Present in the voting area were NLRB Field Attorney Tim Koch (Tr. 18, 96-97), [2] Union observer Angelo Ouellette (Tr. 96, 17-18) and Company Observer Sam Geraci (Tr. 17, 96). Voters entered the voting area one at a time (Tr. 97).

The Employer had previously posted the NLRB Notice Of Election, which includes the depiction of a sample ballot, on the door to the voting area. Employer observer Geraci acknowledged that anyone entering the voting area "couldn't miss it" (Tr. 30). Voter Inendino never claimed to be unaware of the sample ballot displayed on the door leading into the voting area.

The procedure in the voting area was the same for all voters (Tr. 99). The ballots were kept in a stack (Tr. 98, 6, 44). After voters identified themselves to the observers and were checked off the voter list (Tr. 97), Mr. Koch showed each voter the printed side of the ballot, told the voters "this is your ballot" and told them to vote "yes or no, your choice to vote," then folded the ballot into quarters and handed one to each voter (Tr. 105, 97-99). Voter Anthony Inendino was treated the same as every other voter (Tr. 99).

Though employer witnesses attempted to refute portions of the foregoing account, they did not refute its essence. Employer observer Geraci and voter Inendino claimed that Inendino received a folded ballot from NLRB Agent Koch (Tr. 19-20, 43), but both men also acknowledged that the ballots were initially unfolded (Tr. 26, 44), and Mr. Geraci specifically acknowledged that Mr. Koch folded the ballot "in front of the voter" (Tr. 26-27).

[2] Mr. Koch did not testify in the hearing because the NLRB General Counsel declined to permit it under Section 102.118 of the Board's Rules and Regulations, and the Employer stated it would not ask for any adverse inference as a result of Mr. Koch's failure to testify (Petitioner Exh. 1; Tr. 61-62).

Mr. Geraci testified that Mr. Koch told the voters to "mark an X on the ballot" (Tr. 20). Mr. Inendino testified that Mr. Koch said to "put an X on this paper" (Tr. 38). But neither witness directly refuted that Mr. Koch displayed the ballot to the voters, including Mr. Inendino, before folding it and giving it them.

Mr. Inendino took his ballot into the voting booth and cast it in secret (Tr. 27, 99). Mr. Inendino falsely testified that, while casting his ballot, he stared at his folded ballot and asked Mr. Koch for help, claiming he said, "sir, where am I supposed to be putting this X," and that Mr. Koch said, "just put in on the paper" (Tr. 38). There was no corroboration from anyone for this fanciful account. Mr. Ouellette flatly denied it ever occurred (Tr. 100, 106), and Employer witness Geraci failed to corroborate this claim (*see* Tr. 20-21).

After emerging from the voting booth, Mr. Inendino asked what he should do with the ballot, and Mr. Koch told him to put the ballot in the voting box (Tr. 100-01, 27-28). Mr. Inendino dropped the ballot completely inside the voting box then left the room and was out of sight (Tr. 101, 45, 28). Prior to casting his ballot, Mr. Indendino did not display his ballot to anyone, nor say anything about the condition of his ballot, nor say he had mismarked his ballot, nor express any confusion about the voting process, and he did not request a new ballot (Tr. 101, 45). Neither observer testified to observing the particular ballot that Mr. Inendino held in his hand as he emerged from the voting booth and which he later attempted to replace with a new ballot.

Mr. Inendino returned to the voting area at least twice more, and on one occasion he asked to use the bathroom, which request was refused. Witnesses had varied recollections of whether the request to use the bathroom was on his first return or second return visit, but at least 5 – 10 minutes passed before he ever returned to the voting area (Tr. 102, 21-22).

On one of his return trips to the voting area, Mr. Inendino admittedly told Mr. Koch that "he thinks he made a mistake" by placing an X on the outside of his ballot. Mr. Inendino asked to retrieve his ballot from the voting box and to "fix it" (Tr. 102, 107). [3] Mr. Koch said this had never happened to him before. He allowed Mr. Inendino to cast a second ballot, which was placed in a challenge envelope, and the challenge envelope was then placed into the ballot box (Tr. 102-3, 24, 29, 40).

Mr. Geraci and Mr. Inendino attempted to give an alternate version of events. Mr. Geraci claimed that Mr. Inendino said he "only put an X on the folded ballot because nobody told him to open the ballot up and read the inside of the ballot" (Tr. 22). Mr. Indendino claimed to have said, "I asked you when I was back there what should I do with this paper and you didn't say open this up. I said so I did what you said" (Tr. 39-40). But on cross examination, Mr. Inendino finally admitted to the same account as Mr. Ouellette, that he told Mr. Koch: "I think I made some type of mistake" (Tr. 45), thus confirming that any error was Mr. Inendino's, not the Board Agent's.

Mr. Geraci claimed Mr. Koch said that "maybe my instructions were kind of vague, I should have told you to open a ballot up and look at the ballot" (Tr. 22). But his account was not corroborated by either of the other witnesses. When questioned directly whether Mr. Koch used the term "vague," Mr. Ouellette flatly denied Mr. Koch uttered it (107-08), and Mr. Inendino failed to corroborate this testimony in any respect, and he never testified that Mr. Koch used the term "vague" (*see* Tr. 39-40, 45).

After voting ended, when the ballot box was opened and the votes counted, Mr. Koch removed one ballot with only an X on the back side of the ballot and voided it (Tr. 24, 112-13).

[3] Mr. Geraci said Mr. Inendino asked to replace the ballot with another (Tr. 22-23).

The challenged ballot should not be counted and Objection No. 1 should be dismissed

The Employer claims that Mr. Indendino's challenged ballot should be counted in lieu of the voided ballot it attributes to Mr. Inendino, and the Board Agent's refusal to allow Mr. Inendino to replace his first ballot with a second ballot was grounds to set aside the election. But the challenge and objection are misplaced. Board law is long settled that voters have no right to withdraw a ballot that has been cast and to replace it with a new ballot. *Great Eastern Color Lithographic Corp.*, 131 NLRB 1139, 1140-41(1961); *Magic Pan, Inc. v. NLRB*, 627 F.2d 105, 108, 105 L.R.R.M. 2559 (7th Cir. 1980). In *T & G Manufacturing*, 173 NLRB 1503, 1504 (1969), the Board explained that this policy is necessary to prevent pressure being exerted on voters to change their vote:

> A voter is not permitted to withdraw his own ballot, once cast, and we cannot allow the parties to do so. For, as the Board has previously stated:
>
> . . . [O]nce a ballot, whether or not it has been challenged, has been duly cast in an election, the voter loses control over its disposition and may not as a matter of right have it withdrawn. . . . To permit withdrawals of ballots would in certain cases . . . place the finality of the election in the hands of such voters.

This policy is so firmly established that, where the election is conducted in accordance with Board procedures, the Board will not allow voters the opportunity to revote even if the voters claim that they were denied outright the opportunity to vote a first time. Otherwise, it "may encourage employees to vote twice with the possibility that their second vote will be counted if their testimony is credited." *Monfort, Inc.*, 318 NLRB 209 (1995). Nothing occurred during Mr. Inendino's first vote suggesting that Board procedures were not followed. Rather, Mr. Indendino simply wanted to change the prior vote by withdrawing the initial ballot and replacing it with a second one.

Mr. Inendino claims to have been so stupid that, notwithstanding the sample ballot he observed going into the voting area, and Mr. Koch displaying the ballot before folding it and giving it to him, he was somehow duped into thinking he *must* place his mark on the outside of the ballot instead of in one of the boxes. His testimony is simply not credible, but in any event he eventually admitted to telling the Board agent that he had made a "mistake" in the way he cast the ballot – thus acknowledging his own error or at least that he could have avoided the problem.

Further, other than Mr. Inendino's claim to have cast the voided ballot, there is no evidence beyond his self-serving testimony that he actually cast the voided ballot. After Mr. Inendino voted the first time and left the voting area, he might have discovered that another voter cast the void ballot and attempted to add a second vote by claiming another's void ballot as his own. Certainly, once Mr. Inendino cast his ballot and commingled it with the others in the ballot box, there was no way to be certain which ballot was his.

But even if the Board were to *assume* that Mr. Inendino cast the voided ballot, as he claims, the Board has ruled that once votes are cast, ballots may not be removed from the ballot box and replaced with a new ballot, even if the initial ballot should properly have been placed in a challenge envelope rather than cast in the ballot box.

In *Jakel, Inc.*, 293 NLRB 615 (1989), as a voter was placing her ballot in the ballot bag, an observer advised that the voter was supposed to vote by challenged ballot. The Board agent attempted to retrieve the ballot before it fell into the bag and was commingled with the other ballots, but was unsuccessful. The Board agent then opened the ballot bag and removed a ballot, which the voter identified as her own, and which the Board agent then segregated and marked "spoiled." The Board agent then gave the voter a second ballot, which was marked and placed in a challenge envelope. Upon review, the Board set the election aside, finding that removing the

ballot "constituted conduct which would destroy confidence in the Board's election process." The Board further ruled that "it cannot now be determined with reasonable accuracy whose ballot was extracted from the ballot bag." *Id*., at 616. The Board Agent here properly refused to withdraw Mr. Inendino's claimed first ballot from the ballot box. In fact, *Jackel, Inc.* suggests that if the Board agent had retrieved from the ballot box a ballot Mr. Inendino claimed to have been his own, it would have been grounds for setting aside the election.

Accordingly, since there is no lawful way to permit Mr. Inendino to replace his first cast ballot with a second, the Hearing Officer correctly found that the challenge to Mr. Inendino's second ballot should be sustained and Objection No. 1 overruled. [4]

Employer's New Arguments Unavailing

Despite its lengthy brief, the Employer fails to acknowledge the determinative facts in this proceeding: That Inendino voluntarily cast his ballot without complaint and left the voting area, then returned some time later and attempted to retrieve his ballot after it was commingled

[4] Though it is not necessary for the Board to consider the secrecy of Mr. Inendino's ballot for purposes of rejecting the challenged ballot, since Mr. Inendino identified the void ballot as his own during the polling period, if the Region *assumes* that his claim is true, Mr. Inendino thereby destroyed the secrecy of his first ballot and under Board precedent must be refused a second opportunity to vote.

In *General Photo Products Div. of Anken Industries*, 242 NLRB 1371 (1979), the Board confronted a situation where a voter destroyed the secrecy of his initial ballot, which was accordingly voided, then later attempted to vote a second time. The Board ruled that the voter, by showing his vote to others, "thus violating the secrecy of his vote, voided his ballot. As a result, he forfeited any right to have his ballot counted or to be given another opportunity to cast a ballot." *Id*., at 1372. The Board accordingly sustained the challenge to the voter's second ballot. Here, Mr. Inendino's demand to revote cannot be accommodated without compromising the secrecy of his first ballot. The effect of this action is both to void his first ballot and to prohibit him from casting a second ballot.

with the other ballots in the ballot box. We have nothing but Inendino's uncorroborated claim to identify the ballot he sought to withdraw as his own, since neither observer testified to observing the alleged features of the ballot (x on back) when Inendino allegedly cast it. That the polling had not yet closed when Inendino returned to seek a revote is of no legal significance to this case because his ballot had already been commingled with the others.

The Employer makes the silly claim that a "void" ballot simply does not exist "ie, as if he had never cast it in the first place" (p.13) and therefore the voter who casts a void ballot is free to cast another ballot. Under this theory, what prevents any voter who observes a voided ballot emerge from the pile from claiming the void ballot as his or her own and demanding to cast another? There is no logical difference between this scenario and the argument made by the Employer. The voided ballot would have been a nullity only if Mr. Inendino had asked the Board Agent to void the ballot before he cast it. That Mr. Inendino sought a revote before the polling had closed – much ballyhooed by the Employer – is of no legal significance here because the critical fact is that Mr. Inendino's ballot had already been cast and commingled with the others. The Employer's theory here, if accepted, would make a mockery of the Board's election processes.

The Employer's alternate claim, that voter Inendino was "confused" by the Board Agent (pp. 20-22), is equally unavailing. Most of Mr. Inendino's claims as to the Board Agent's confusing actions are belied by the record. The Employer's own observer testified that the Notice of Election featuring the sample ballot was attached to the door entering the voting area so that Inendino could not have failed to see it when entering. The claim that the Board Agent handed Mr. Inendino a pre-folded ballot is belied by the admissions that the ballots were laying flat and the Board Agent folded them in front of each voter. There were varying accounts of

what the Board Agent told Inendino, but all concur that Inendino was told to mark the ballot. Mr. Inendino's claim that the Board Agent gave him confusing instructions in the voting booth was outright refuted by one witness and not corroborated by the other. And Mr. Inendino admittedly said nothing suggesting he was confused after he emerged from the voting booth and dropped his ballot into the ballot box. When he returned some time later, Mr. Inendino acknowledged that the problem with voting was his own since he admittedly told the Board Agent that he (Indendino) had made a "mistake."

But in relying on Inendino's subjective claim to have been confused, the Employer here urges the Board to adopt an unreasonable standard to combat possible voter confusion. Either the Board must accept the testimony of any voter that he or she was subjectively "confused," which could be used to undermine the Board's processes by "encourag[ing] employees to vote twice with the possibility that their second vote will be counted if their testimony is credited." *Monfort, Inc.* Alternatively, the Board would must impose an unreasonable amount of specificity in the instructions given to voters, since the Employer here apparently faults the Board Agent for not instructing Mr. Inendino to: 1) take the ballot into the voting booth; 2) open the ballot completely so it is no longer folded; 3) look at the side of the ballot where there is writing; 4) read the side of the ballot that has the writing; and 5) mark your choice inside the appropriate box. As the hearing officer correctly noted, the Board is not obligated to set "unrealistic standards which insist on improbable purity of word and deed on the part of the parties or Board agents." *Newport News Shipbuilding*, 239 NLRB 82 (1978).

In a last gasp, the Employer cites *Van Bourgondien & Sons, Inc.*, 294 NLRB 268 for the proposition that the Board Agent could have taken "the admittedly unusual step of opening the ballot box and retrieving [Inendino's] folded ballot" (p. 25). In *Van Bourgondien*, a divided

Board ruled that removing a cast ballot from the ballot box to replace it with a new ballot was not grounds for setting aside an election. The dissenting member would have voided the election on this basis. But the Employer misconstrues the import of this decision. Though a divided Board did not set aside the election, the ruling does *not* even remotely suggest that failing to retrieve a cast ballot is grounds to set aside an election. Moreover, the Board there found that the ballot could be positively identified in part because no ballots had been cast since and it sat "on top of the pile." 294 NLRB at 270. There is nothing in the record to establish that Inendino's ballot could have been positively identified after it was cast other than his own uncorroborated claim, and no reason to assume his ballot still lay "on top of the pile" so long after he had voted.

CONCLUSION

For the foregoing reasons, the Board is respectfully requested to adopt the Hearing Officer's Recommendation that the determinative challenged ballot of Anthony Indendino be sustained, that the Employer's Objection no. 1 be overruled, and that a Certification of Representative issue.

Respectfully submitted,

/s/ Robert E. Bloch
Attorney for Petitioner

Robert E. Bloch
Dowd, Bloch, Bennett & Cervone
8 S. Michigan Avenue, 19th floor
Chicago, IL 60603
rebloch@dbb-law.com

CERTIFICATE OF SERVICE

The undersigned certifies that the attached Petitioner's Answering Brief was filed by electronic docketing with the National Labor Relations Board, and a copy served electronically on Employer Magnum Transportation, Inc. through its counsel Michael W. Duffee, at MDuffee@thompsoncoburn.com, and a copy sent by United States mail to Region 13 Regional Director Peter S. Ohr by United States mail, postage prepaid, on March 6, 2014.

/s/ Robert E. Bloch